

**Minister for Housing and Public Works**  
**Queensland Government Response to**  
**Transport, Housing and Local Government Committee Report No. 52**  
***Building and Construction Industry Payments Amendment Bill 2014***

**INTRODUCTION**

On 1 September 2014, the Transport, Housing and Local Government Committee tabled its Report No. 52 on the *Building and Construction Industry Payments Amendment Bill 2014*.

The Queensland Government response to the Report's recommendations is provided below.

**RESPONSE TO RECOMMENDATIONS**

**Recommendation 1**

The Committee recommends that the Building and Construction Industry Payments Amendment Bill 2014 be passed.

**Queensland Government Response**

The Government thanks the Committee for its consideration of the Bill and appreciates the Committee's recommendation that the Bill be passed.

**Recommendation 2**

The Committee recommends the development and inclusion in the Bill of high-level guiding principles, including factors or criteria to guide the adjudicator appointment process, which the registrar and agency staff (to whom the appointment of adjudicators is delegated), must comply with in the appointment of adjudicators.

**Queensland Government Response**

The Government agrees that it is necessary to establish criteria and a set of principles for the ranking and appointing of adjudicators, however, it is not considered that the high level guiding principles surrounding the appointment of adjudicators should be included in the Bill.

It is considered that the appointment of adjudicators is best accomplished in a more transparent manner by publishing the appointment principles by way of a Queensland Building and Construction Board (QBCC Board) approved policy, which will be given effect through a new policy making provision in the amended Bill.

It should also be noted that the appointment of adjudicators by the Registrar will operate under the watch and investigation powers of both the Crime and Corruption Commission and the Ombudsman.

For these reasons an amendment to the Bill is not supported. However, it should be noted that the recommendation will be addressed through a QBCC Board policy approved in an amendment to the *Building and Construction Industry Payments Regulation 2004*

(Regulation) which is intended to take effect from the commencement of the amended Act which is proposed for October 2014.

### **Recommendation 3**

The Committee recommends that an alternative model for the appointment of adjudicators to matters where the Queensland Government is a party be developed and included in the Bill.

### **Queensland Government Response**

The Government is of the view that the power to appoint adjudicators is best undertaken by the Registrar in all instances. The Registrar will be selecting adjudicators based on a Board approved policy and all activities undertaken by the Registrar are under the jurisdiction and investigative powers of the Crime and Corruption Commission and the Ombudsman, which means that all decisions are under scrutiny at all times. This will alleviate any concern surrounding the perception of bias.

In addition to these measures, the daily publication of adjudication decisions on the Queensland Building and Construction Commission (QBCC) website will continue to occur. The appointment of adjudicators will also be published daily on the QBCC website. Both of these activities clearly demonstrate that the Registrar is the most appropriate person to make decisions regarding the appointment of adjudicators for all claims.

For these reasons an amendment to the Bill is not supported.

### **Recommendation 4**

The Committee recommends that the Bill be amended in keeping with Recommendation 19 of the Wallace Report which recommends amendment of the *Building and Construction Industry Payments Act 2004* to ensure that adjudicators fall within the jurisdiction of the Crime and Corruption Commission.

### **Queensland Government Response**

The Government agrees that there should be monitoring of the activities of adjudicators but considers that this should be by the QBCC.

Under the *Crime and Corruption Act 2001*, adjudicators appointed under the current *Building and Construction Industry Payments Act 2004* (Act) are not considered to be 'public officials' nor do they hold an appointment in a unit of public administration. Therefore, adjudicators are not subject to the jurisdiction of the Crime and Corruption Commission.

The position of adjudicators will not change under the Act as proposed to be amended. Accordingly, it is not proposed to expand the jurisdiction of the Crime and Corruption Commission. However, it should be noted that the Bill proposes an increased level of monitoring of adjudicators by the QBCC.

For these reasons an amendment to the Bill is not supported.

### **Recommendation 5**

The Committee recommends that the Minister make a statement during his second reading speech outlining the advice sought and received from the Queensland Competition Authority and addressing the perception that the amendments are anti-competitive.

### **Queensland Government Response**

The Government notes this recommendation and that the Minister for Housing and Public Works proposes to address this matter in the second reading speech during debate of the Bill.

### **Recommendation 6**

The Committee recommends that the Minister specify in the Bill who will be responsible for the training and accreditation of adjudicators (currently a statutory function undertaken by only those ANAs prescribed under the Building and Construction Industry Payments Regulation 2004) once other statutory functions are transferred to the Registry.

### **Queensland Government Response**

The Government agrees in-principle with the recommendation but advises that a proposed amendment to the Regulation will make provision for training and accreditation providers for the adjudication qualification course, which will be offered from early 2015.

For the reasons above the Government does not support an amendment to the Bill. However it should be noted that the requirement is proposed to be included in the Regulation.

### **Recommendation 7**

The Committee recommends that the Bill be amended to include indemnity protection for Authorised Nominating Authorities to cover them for any existing function claims prior to the amendment of the legislation.

### **Queensland Government Response**

The Government advises that indemnity protection of former Authorised Nominating Authorities in respect of their functions prior to the amendments will be preserved in accordance with section 20(2)(a) and (b) of the *Acts Interpretation Act 1954* which has the effect of saving the previous operation of an Act or anything suffered, done or begun under an Act and of saving a right, privilege or liability acquired, accrued or incurred under an Act.

It is considered that an amendment to the Bill is not required.

### **Recommendation 8**

The Committee recommends that the Bill be amended to include a requirement that adjudicators engage independent agents.

### **Queensland Government Response**

The Government agrees with the recommendation regarding a requirement that adjudicators engage independent agents to undertake administrative functions on behalf of the adjudicator. However it is proposed that this requirement will be addressed through a suitable condition of registration that the Registrar intends to impose on all adjudicators.

For these reasons an amendment to the Bill is not supported. However it should be noted that the recommendation will be addressed through a condition of registration that will be imposed on all adjudicators which will take effect from commencement of the amended Act, proposed for October 2014.

#### **Recommendation 9**

The Committee recommends that the Bill be amended to remove the inclusion of both latent and time-related costs from the definition of complex claims.

#### **Queensland Government Response**

The Government agrees to propose an amendment to the definition of 'complex claims' by removing the inclusion of latent conditions and time-related costs. It is proposed the Bill will be amended accordingly.

#### **Recommendation 10**

If the Minister does not agree to Recommendation 9 (above) to remove 'latent' and 'time-related' from the definition of 'complex claim' in the Bill, then the Committee recommends that the Minister investigate and implement alternatives for the resolution of claims which have been incorrectly classified by the claimant as 'standard'.

#### **Queensland Government Response**

The Government notes the Committee's recommendation.

#### **Recommendation 11**

The Committee recommends that the Minister implement Wallace's Recommendations 10-15 concerning the inclusion of retention monies and securities in payment claims, the establishment of a Construction Retention Bond Scheme, the introduction of penalties for contractors and the empowerment of adjudicators to direct the release of securities, through amendments to the *Building and Construction Industry Payments Act 2004* and the *Queensland Building and Construction Commission Act 1991*.

#### **Queensland Government Response**

The Government notes the Committee's Recommendation 11 and further notes comments that Recommendations 10, 12, 13, 14 and 15 of the Wallace Report should be adopted, if not in this Bill, then in future amendments to the Act. The Government will further investigate and consider adopting these recommendations in future amendments to the Act.

Although the Government supports in-principle the establishment of a Construction Retention Bond Scheme (Recommendation 11 from the Wallace Report) the Government endorsed that the Minister for Housing and Public Works will monitor the outcomes from the development of a Construction Retention Bond Scheme in New South Wales. The Minister for Housing and Public Works will further consider implementing a Construction Retention Bond Scheme following advice on outcomes of implementation of the statutory retention trust fund scheme in New South Wales.

#### **Recommendation 12**

The Committee recommends that the Minister investigate ways to protect claimants against non-payment of outstanding amounts once a contract has been terminated.

### **Queensland Government Response**

The Government notes the Committee's recommendation and advises that the Department of Housing and Public Works will investigate ways to protect claimants against non-payment of outstanding amounts once a contract is terminated. It is proposed that the outcomes from this investigation will be known at the time the outcomes from the planned 12 month review on the impacts of the revised legislation are known.

### **Recommendation 13**

The Committee recommends that the Bill be amended to provide for the regulation of all adjudication fees and costs including, but not limited to, the adjudication application, the adjudication fee and the adjudication certification process.

### **Queensland Government Response**

The Government agrees that the adjudication application and certificate fees should be provided for in the Regulation. However, the fees charged by each adjudicator, aside from deciding adjudication applications where the claimed amount is \$25,000 and below, will vary and in relation to these matters the Government does not propose to generally set these in the Regulation.

However, it is proposed to establish a fixed adjudication fee regime for inclusion in the Regulation that will be limited to payment claims up to \$25,000. All claims above \$25,000 will be adjudicated at an hourly fee set by each adjudicator.

For this reason an amendment to the Bill is not supported.

### **Recommendation 14**

The Committee recommends that the Bill be amended to replace 'must' with 'may' in proposed section 100(4) to provide the Supreme Court with a discretion to enforce part of a payment rather than a direction to do so.

### **Queensland Government Response**

The Government agrees with the Committee's recommendation and proposes that the Bill will be amended accordingly.

### **Recommendation 15**

The Committee recommends that the Bill state clearly how claims, schedules and adjudication applications which have already commenced are to be treated under the amended Act.

### **Queensland Government Response**

The Government agrees with the Committee's recommendation and proposes that the Bill will include transitional arrangements addressing how claims, schedules and adjudication applications will be treated.

### **Recommendation 16**

The Committee recommends that the Bill be amended to address the drafting errors identified in submissions to the Bill enquiry.

**Queensland Government Response**

The Government agrees with the Committee's recommendation and proposes that the Bill will be amended accordingly.

**Recommendation 17**

The Committee recommends that the Bill be amended to ensure that Section 20A is clarified, specifically:

- Delete sections 20A(1)(b) and 20A(4)(a)(ii) so that a claimant has an immediate right to start proceedings where a payment schedule has been given but the scheduled amount is unpaid
- Clarify section 20A so that, where a second chance payment schedule is given under section 20A, then section 19 does not apply and
- Clarify the interactions between new section 20A and provisions relating to lodging an adjudication application

**Queensland Government Response**

The Government agrees with the Committee's recommendation and proposes that the Bill will be amended accordingly.

**Recommendation 18**

The Committee recommends that the Bill be amended to address the inconsistencies identified in submissions to this Bill enquiry.

**Queensland Government Response**

The Government agrees with the Committee's recommendation and proposes that the Bill will be amended accordingly.